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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 657

JADIE S. ADAMS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the United States District Court for the Middle District of Alabama (Pet. App. 2a-7a) are not reported. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is reported at 260 F. 2d 467.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1958. The petition for a writ of certiorari was filed on January 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court's finding that petitioner was contributorily negligent was clearly erroneous.

2. Whether the District Court, in the circumstances of this case, abused its discretion in denying petitioner's motion, under Rule 34 of the Federal Rules of Civil Procedure, for discovery of an Air Force investigative report of the accident in issue.

STATEMENT

Petitioner brought this action against the United States under the Federal Tort Claims Act to recover damages for personal injuries and loss of earnings assertedly resulting from a collision on February 16, 1957, between her automobile and an Air Force vehicle. The collision occurred while petitioner was making a right turn, at an intersection in Montgomery, Alabama, and the complaint alleged that it was proximately caused by the negligence of the Air Force enlisted man who was driving the Government vehicle. In its answer, the United States denied negligence and asserted the affirmative defense of contributory negligence.

Before trial, petitioner made a motion under Rule 34 of the Federal Rules of Civil Procedure for discovery and inspection of four documents (R. 34). One of these documents was the official report of the in-

vestigation of the accident, which had been prepared by the Air Force Staff Judge Advocate at Maxwell A.F.B., Alabama (R. 35). The other documents sought were two reports of the accident made by the Air Force driver, and the Air Force "trip ticket" relating to the trip in which the Government vehicle was engaged at the time of the accident.

Except as to the official investigation report, the District Court granted petitioner's motion with respect to all of the documents. In its order, the court determined (R. 37):

> It appears from said motion and from the statements made by counsel that the documents sought in paragraph numbered 1 of said motion constitute the entire official investigation of the accident as made by or on behalf of the defendant. This Court is of the opinion that no such requirement should be made of the defendant. The information sought in paragraphs numbered 2, 3, and 4 of said motion relate to specific items and this Court is of the opinion that said items should be furnished for the inspection and copying by the Plaintiff.

At the trial, the District Court found that the Air Force driver, in following the petitioner's car too closely, was negligent and in violation of Alabama law. The court went on to find, however, that the petitioner was also negligent (1) in failing to give the signal indicating her intention to make a right turn for the distance required by Section 87(c), Chapter 18 of the 1952 Code of Montgomery, Alabama;[1] and (2)

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[1] (c) "A signal of intention to turn right or left when required shall be given continually during not less than the last one hundred feet traveled by the vehicle before turning." Section 87(c), Chapter 18, City Code of Montgomery, Alabama.

in swerving from the outside lane into the inside lane before she made a right turn.[2] The court further found that the petitioner's negligence was a proximate cause of the accident and held that she was therefore not entitled to recovery.

The Court of Appeals affirmed (Pet. App. 1a). Citing Rule 52(a) of the Federal Rules of Civil Procedure, it held, "[a]fter carefully studying the testimony and exhibits," that the finding that the petitioner was contributorily negligent was not clearly erroneous. The court also held, on the authority of *Hickman* v. *Taylor*, 329 U.S. 495, that the District Court had not abused its discretion in declining to permit petitioner's counsel to inspect the investigation report prepared by the Air Force Staff Judge Advocate.

ARGUMENT

As the Court of Appeals correctly determined, the District Court's finding that petitioner was contributorily negligent is not clearly erroneous. There is no greater merit to petitioner's assertion, also rejected by the Court of Appeals, that the District Court abused its discretion in not permitting petitioner to inspect the investigation report prepared by the Staff Judge

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[2] In this connection, the court found that petitioner had violated Section 16 of Title 36 of the 1940 Code of Alabama, which provides:

> (a) * * * the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane of traffic nearest to the right hand side of the highway, and in turning shall keep as close as practicable to the right hand curb or edge of the highway * * *.

and Section 56(a) of Chapter 18 of the 1952 City Code of Montgomery, Alabama, which provides: "Both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway."

Advocate. There is no conflict of decisions and the questions raised by the petition are not of general importance.

1. Both of the courts below have resolved adversely to petitioner the factual questions as to (1) her failure to give an adequate signal before making a right turn; and (2) the unlawful swerve of her vehicle prior to that turn. Their resolution of these questions is amply supported by the record.[3] Moreover, the concurrent findings of the two courts below are final here in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214. The petition fails to demonstrate that exceptional error was committed.[4]

2. Rule 34 of the Federal Rules of Civil Procedure provides:

> Upon motion of any party *showing good cause therefor* * * * the court in which an action is

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[3] On the question of petitioner's failure to signal, the petitioner herself testified (R. 156), by reference to points in the courtroom, that she turned on her signal at a distance estimated by the court to be "not exceeding sixty feet" (Pet. App. 4a) before making her turn. A passenger in the Air Force vehicle testified that he did not see the petitioner make any signal (R. 344), and the driver testified she made no signal (R. 309).

On the question of the unlawful swerve to the left, the testimony of witnesses Barrow (R. 285), Collins (R. 303), and Johnson (R. 336) supported the determination by the courts below.

[4] There is no foundation to petitioner's assertion (Pet. 21, *et seq.*) that the District Court findings were "clearly erroneous" because, in an answer to an interrogatory, the Government had stated that, without warning, petitioner had "nearly stopped or did stop" before beginning the turn. As Professor Moore has observed (4 Moore's *Federal Practice*, 2d ed., Section 33.29, p. 2345):

> * * * a party should not be bound by answers to interrogatories if subsequent investigation discloses new facts; the discovery rules are not to be used as a tactical device for tying a party down to a disadvantageous position or for suppressing facts.

> pending may * * * order any party to produce and permit the inspection and copying or photographing * * * of any designated documents * * *. [Emphasis supplied.]

In her motion under this rule for discovery of the Air Force investigation report, petitioner did not even suggest the existence of "good cause". In these circumstances, she is hardly in a position to complain that the District Court abused its discretion in declining to order production of the document.

On the basis of subsequent developments at the trial, petitioner argues, however, that the District Court was required to grant discovery. Specifically she points to the fact that the Government called as a witness the Air Force officer (Lieutenant Colonel Barrow) who had notified the Air Force police of the accident (Pet. 25). Noting that the Government had not referred to this officer in its answers to interrogatories, petitioner hypothesizes that both his name and certain relevant information in his possession would have been disclosed by the investigation report.

Aside from the consideration that the action of the District Court must be judged in the light of the situation at the time the motion for discovery was filed, and the additional consideration that petitioner did not renew her motion when Colonel Barrow testified, there is clearly no merit to petitioner's suggestion that the report would have contained any reference to Barrow. As the United States Attorney explained, Colonel Barrow was not known to have been a witness to the accident at the time the petitioner's interrogatory was answered (R. 279). This explanation was borne out by Barrow's own testimony (R. 279, 280) that he had been interviewed with respect to the accident about two

weeks before the trial,[5] *i.e.*, over a week after the Government answered petitioner's interrogatories[6] and eleven months after the completion of the accident report on April 16, 1957.[7]

In addition to the petitioner's failure to show good cause for the production and inspection of the investigation report, the Court of Appeals correctly held that the trial court was justified under the rule of *Hickman* v. *Taylor*, 329 U.S. 495, in not requiring the Government to produce the report. The Government answered petitioner's 47 interrogatories (R. 21-34), and furnished photographs and sketches of the scene of the accident to the petitioner (R. 44, 45, 46, 47, 48). The court also permitted discovery of the two reports of the accident made by the driver and the "trip ticket" (*supra*, p. 3). In view of this broad disclosure of pertinent information, it is doubtful whether petitioner can rely upon this Court's decision in *Hickman* v. *Taylor* to justify the disclosure of the work-product of the Air Force's legal staff.

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[5] The trial began February 18, 1958 (R. 43).

[6] The Government's answers were filed January 28, 1958 (R. 21).

[7] Petitioner also notes that one of the passengers in the Government vehicle was not called as a witness and speculates that the investigation report "would have revealed knowledge by this third person of facts detrimental to the government's case" (Pet. 25). This third person was Alfred V. Chapin, whose name and address were furnished the petitioner in the Government's answer to petitioner's interrogatory number 47 (R. 33). If petitioner's speculation is correct, she could have called Chapin as a witness, or at least requested the Government to furnish any statements made by him about the accident.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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Solicitor General.

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FEBRUARY, 1959